Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JEAN KERTESZ,

Petitioner,

v.

ALBERT CARY PLOTKINS,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A PRIVATELY EMPLOYED UNIVERSITY PROFESSOR WHOSE SALARY IS PAID SOLELY THROUGH GRANTS FROM THE FEDERAL GOVERNMENT TO PERFORM RESEARCH FOR A GOVERNMENT AGENCY HAS A PROTECTED PROPERTY INTEREST AGAINST THE UNIVERSITY UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SHE IS RETROACTIVELY TERMINATED FROM THAT EMPLOYMENT WITHOUT A HEARING, AFTER WORKING TWO YEARS WITHOUT A SALARY RELYING ON HER EMPLOYER'S ASSURANCES OF EVENTUAL BACK PAY ONCE THE FEDERAL GRANT WAS RENEWED, AND WHEN SHE IS DEPRIVED OF HER RESEARCH NOTEBOOKS AND OTHER VALUABLE MATERIALS UPON HER OUSTER.

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PETITION FOR WRIT OF CERTIORARI

Jean Kertesz respectfully prays that a writ of certiorari issue to review an important constitutional question presented by the judgment of the California Court of Appeal, rendered May 4, 1995. At issue here is the constitutionality of denial of the benefit of salary, personal property, and occupation without exercise of the due process rights guaranteed by the Fifth Amendment to the United States Constitution.

OPINIONS BELOW

The nonpublished opinion and decision of the Court of Appeal for the State of California, Second Appellate District, Division One, affirming the judgment of the Los Angeles County Superior Court rendered against petitioner, is reproduced as an Appendix to this petition, APP 1-15. The order of the California Supreme Court denying her petition for review of the Court of Appeal's decision is appended as APP 16.

JURISDICTION

The judgment of the California Court of Appeal is set forth in its opinion filed May 4, 1995. The Court of Appeal denied Petitioner's petition for rehearing on May 25, 1995. The California Supreme Court denied her petition for review on July 19, 1995. Under California law, the judgment of the Court of Appeal became final upon the Supreme Court's denial of review. Cal. Rules of Court, R.

24, 25, 28. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution (due process clause) provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The present case is a legal malpractice action. Its genesis was the failure of Respondent, Petitioner's former attorney, diligently to prosecute the wrongful termination action he had filed in Petitioner's behalf against her former employer, resulting in dismissal of the wrongful termination case. APP 4-5. At the legal malpractice trial, the jury returned verdicts finding Respondent was negligent, but that he was not the legal cause of Petitioner's damages. APP 5-6. The Court of Appeal inferred from the

verdicts that the jury believed the underlying wrongful termination case lacked a probability of success on the merits notwithstanding Respondent's negligence. APP 7-8. Accordingly the constitutional question presented by Petitioner appropriately focuses on the merits of the underlying wrongful termination case.

The evidence before the jury reflects that Petitioner Jean Kertesz had been a graduate student and paid teaching assistant at the University of Southern California School of Pharmacy ("USC") during the 1960's, and worked as a research associate from 1968-1977 under the supervision of Dr. Walter Wolf. Petitioner received her Ph.D. degree in pharmaceutical chemistry in 1970. Appellant's Opening Brief ("AOB") at 4; APP 2. During a nine-year period, Petitioner's salary was paid through research grants to USC primarily from the United States Department of Energy ("D.O.E."). Respondent's Brief ("RB") at 7; APP 2. In lay terms, her studies funded by the D.O.E. contracts with USC related to the effects of radiation on body chemistry. RB 6.

During this period, Petitioner performed most of the scientific work related to these D.O.E. projects herself. RB 7. Effective July 1, 1977, USC promoted Petitioner to the faculty position of Assistant Research Professor, with the expectation that she would be the person listed as "principal investigator" on D.O.E. reports because she now had a faculty title. RB 7; AOB 5. The promotion letter received by petitioner, dated March 11, 1977 and signed by the School of Pharmacy's Dean John Biles, stated:

> "I am pleased to inform you that the Promotions and Appointments Committee of the University of Southern California School of

Pharmacy has approved your promotion to Assistant Research Professor.

"The title of Assistant Research Porfessor [sic] is a *faculty* title but does not qualify you for tenure. It is outlined in the *faculty handbook* on page 24, section d. (Non-tenure Appointments; Special Designation).

"I wish you continued success in your research efforts."

AOB 5. (Emphasis added.)

The USC faculty handbook contained the following provisions:

"d. Non-Tenure Appointments; Special Designations.

"Non-tenure appointments at the rank of Associate Professor or Professor are reserved for *faculty* who are eligible based on U.S.C. appointment and promotion procedures.

"Special Designations. The following designations may be applied as indicated by the conditions of appointment:

"Research Professor designates distinguished faculty whose primary responsibility is to conduct research. . . . "

RB 8-9. (Emphasis added.)

"f. Procedures Relating to Dismissal.

"Action to dismiss a *faculty* member . . . must follow carefully detailed procedure with the full cognizance of the affected person. . . .

"The full set of rights described below must be observed in any action to dismiss [1] a faculty

> member or librarian with tenure or [2] a *non-tenured faculty* member or librarian before the expiration of his/her appointed term or [3] in any action involving non-reappointment of non-tenured faculty member or librarian for any reason other than failure to meet academic standards and professional qualifications required of a faculty member. . . . "

AOB 7-8, RB 11. (Emphasis added.)

Among the "full set of rights" referred to in the USC faculty handbook was the right to notice *and* salary pending any dismissal or suspension. AOB 8.

Petitioner's contract of employment was contained in four documents, including the March 11, 1977 promotion letter and the faculty handbook. APP 2. Petitioner understood from Dr. Wolf that her appointment as Assistant Research Professor was for a term of one year and that it was renewable; however, there was testimony at trial that Dean Biles believed Petitioner was an "at-will" employee. AOB 8; APP 11 n 7.

After her appointment to faculty, Petitioner received paychecks from USC for $1,666.67 per month from July to October 1977. AOB 8. After October 1977 she only received one more paycheck in April 1978, and fringe benefits ceased. AOB 9.

The D.O.E. grant which funded Petitioner's research project was due to expire in October 1977. APP 2. Along with her other D.O.E. project responsibilities, Petitioner was required to submit information about the scientific work necessary for the renewal proposal, a Triennial Overview Report, and a progress report; all of these

procedures were necessary to renew the federal grant. AOB 10; RB 7.

Assured by Dr. Wolf that she would receive back pay when the D.O.E. renewed the grant, and that its renewal was "certain", Petitioner continued her work on the D.O.E. project which included efforts toward the reports and documentation required to renew the grant. AOB 9-10; RB 6-7; APP 2-3. Dr. Wolf also filed "no cost extensions" with the D.O.E., a device intended to keep the contract "technically alive on D.O.E.'s books" until the necessary scientific materials and reports could be completed to renew the grant. APP 3. However, Petitioner learned from D.O.E. officials in August 1978, when the renewal documentation was submitted, that funding for the project had irrevocably terminated effective October 31, 1977. AOB 9.

Nevertheless Petitioner continued her work and was not terminated, albeit remaining in a "state of limbo." APP 3. In October 1979, she initiated the grievance procedure with a letter of complaint to USC; Dean Biles responded by letter in November 1979, informing Petitioner for the first time that the University considered her employment terminated as of October 1977 and asking her to leave. She continued to pursue the grievance procedure outlined in her faculty handbook, a three-phase process comprising an administrative proceeding, mediation, and appeal. AOB 9-10; APP 3-4. However, before she could complete the third phase of the grievance process, in July 1980 Associate Dean Koda tore down Petitioner's laboratory set-up and removed the research notebooks she had compiled through her entire career. AOB 11; APP 4. Petitioner's repeated efforts to obtain her property

were futile, and she thereby became unable to complete seven manuscripts that she was preparing. AOB 11. Subsequent efforts to resume her career elsewhere proved futile. AOB 14.

Petitioner filed a claim for back wages with the California Department of Labor, Division of Labor Standards Enforcement. APP 4. She also filed a state court application for a temporary restraining order to prevent her ouster from the laboratory, which was granted on June 16, 1980, but the preliminary injunction was denied on July 3, 1980; four days later she was evicted. AOB 11; RB 18.

In May 1980, the California Department of Labor advised Petitioner that it had received a settlement offer from USC of $11,600. When she did not accept the offer, the Department notified her no further action would be taken. APP 4.

On July 14, 1980, Petitioner received notice from USC that her grievance process had entered the third stage. She was still involved in this third phase when she hired Respondent to represent and counsel her, in October 1981, believing USC was "stonewalling". AOB 11. Respondent immediately filed a state complaint in the Los Angeles Superior Court on Petitioner's behalf, alleging wrongful termination; the grievance procedure was never completed. AOB 11; APP 4.

Respondent, a new attorney at the time, RB 19, told Petitioner on two occasions as late as November 1983 that it was probably safe to wait to serve the complaint. AOB 15-16. At Petitioner's urging, the complaint was finally served in late 1984. RB 20. Its service prompted a written

settlement offer from USC, but because Respondent had moved his office and did not notify the court or opposing counsel of his new address, he did not receive the proposed settlement agreement until March 1985. RB 20; AOB 16.

Of greater consequence, because Respondent moved without filing a notice of change of address with the superior court, he did not receive the court's notice that it had set a hearing on an Order to Show Cause re Dismissal, on its own motion, to be heard October 3, 1985. RB 20; AOB 16. Absent any appearance by Respondent on the date set, and because Petitioner was unaware of the superior court's order, the case unsurprisingly was ordered dismissed. RB 21.

There was some contact between Petitioner and Respondent between October 23, 1985 and February 1986, but Petitioner became frustrated when she did not hear from Respondent and decided to retain another lawyer. It was not until after she retained new counsel, on October 16, 1986, that Petitioner learned her lawsuit against USC had been dismissed for want of prosecution. Although she tried to set aside the default, and appealed the denial of her motion, all efforts were unsuccessful. AOB 17.

In November 1986, Petitioner filed the present action in the superior court against Respondent for legal malpractice. APP 5. In 1991, the case was tried to a jury, which rendered two special verdicts finding that Respondent was indeed negligent, but such negligence was not the legal cause of damage to Petitioner. The Court of Appeal interpreted these verdicts to mean that the jury

did not believe Petitioner would have won her underlying suit against USC, and found that determination supported by substantial evidence. APP 8-9. Rejecting the remainder of her contentions, the court affirmed the adverse judgment. APP 6, 15. Petitioner's request for rehearing was summarily denied, as was her petition for review by the California Supreme Court. APP 16.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS CONCERNING WHETHER A PRIVATELY EMPLOYED UNIVERSITY PROFESSOR WHOSE SALARY IS PAID SOLELY THROUGH GRANTS FROM THE FEDERAL GOVERNMENT TO PERFORM RESEARCH FOR A GOVERNMENT AGENCY HAS A PROTECTED PROPERTY INTEREST AGAINST THE UNIVERSITY UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SHE IS RETROACTIVELY TERMINATED FROM THAT EMPLOYMENT WITHOUT A HEARING, AFTER WORKING TWO YEARS WITHOUT A SALARY RELYING ON HER EMPLOYER'S ASSURANCES OF EVENTUAL BACK PAY ONCE THE FEDERAL GRANT WAS RENEWED, AND WHEN SHE IS DEPRIVED OF HER RESEARCH NOTEBOOKS AND OTHER VALUABLE MATERIALS UPON HER OUSTER.

A WHETHER PETITIONER WAS DEPRIVED OF A PROTECTED PROPERTY INTEREST BY THE RETROACTIVE TERMINATION OF HER SALARY WITHOUT NOTICE OR HEARING.

The underlying facts are relatively straightforward and largely undisputed as they bear on the due process question presented by Petitioner's case.

Petitioner was working exclusively on research funded by grants awarded to USC, primarily from D.O.E., at the time her salary was abruptly cut off in October 1977. APP 2-3. However, Petitioner was not told this meant her appointment earlier that year to Assistant Research Professor had been affected in any way. To the contrary, her supervisor, Dr. Wolf, informed Petitioner she would receive back pay when the federal grant was renewed and he assured her that renewal of the grant was certain. AOB 9-10; RB 6-7; APP 2-3. Based on these assurances, Petitioner continued her work on the D.O.E. project, including efforts to obtain renewal of the grant as part of her responsibilities. AOB 9-10. Reinforcing his assurances to Petitioner, Dr. Wolf also filed "no-cost extensions" with the D.O.E., a means by which the USC contract would be kept on the D.O.E.'s books until the grant was renewed. APP 3. In the light of all these circumstances, Petitioner had no reason to believe USC had terminated her employment. It was not until August of 1978 that Petitioner first learned the D.O.E. grant had irrevocably expired on October 31, 1977. APP 3; AOB 9. In September 1979 Dr. Wolf asked her to leave, and in November 1979 Dean Biles informed her for the first time that her employment was deemed terminated as of October 1977. APP 3.

It is in this posture that Petitioner submits she had a property interest protected under the Due Process Clause of the Fifth Amendment, that entitled her to notice and hearing prior to retroactive termination of her employment including deprivation of her salary, and the removal and likely destruction of her research papers and other valuables.

Whether Petitioner had a protected property interest as to support her entitlement to salary and similar benefits is governed by existing "rules or understandings," which may stem from such independent sources as state law, or "rules or mutually explicit understandings," or implied or quasi-contracts. *Perry v. Sindermann*, 408 U.S. 593, 601-602 (1972); see also *Board of Regents v. Roth*, 408 U.S. 564 (1972). The rules or understandings on which an employee bases his or her Fifth Amendment claim must create an "objectively reasonable expectation" of continued employment. *Doe v. Gates*, 981 F.2d 1316, 1320 (D.C. Cir. 1993), *cert denied*, ___ U.S. ___, 126 L.Ed.2d 282 (1993). Whether the property interest in employment is created by law or by implied contract, the sufficiency of the claim must be decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 344 (1975).

Petitioner's claimed entitlement under the facts *sub judice* is founded on mutually explicit understandings between her and USC as her employer, in accordance with *Perry*, 408 U.S. at 601, and as is explained more fully below. See *Roberts v. College of the Desert*, 870 F.2d 1411, 1416 (9th Cir. 1988). Petitioner's entitlement is also solidly founded on state law. The mutual understandings constituted an implied contract under California law. Under the theory of implied contracts in California, where one party performs a service for another that is of a character which is ordinarily compensated, with the expectation of payment, and where the other party knowingly accepts that service in circumstances negating an inference of gift, a contract to pay the reasonable value thereof will be implied. *Keene v. Keene*, 57 Cal.2d 657, 664, 21 Cal.Rptr. 593, 371 P.2d 329 (1962).

The California Court of Appeal nevertheless rejected the predicate of Petitioner's constitutional claims by holding that her employment was terminable at-will. APP 10-11; AOB 28-31. Whether that determination of state law is or is not sound, however, the fact remains that even if Petitioner's employment was terminable at will, she still had a property interest in receiving her salary *while* she remained employed and *until* she was terminated. This property interest was created through the mutually explicit understandings and resulting implied contract between Petitioner and her employer after October 1977. There is no question that when Petitioner's salary ceased in October 1977, she was *not* told her employment was terminated; instead, she was *assured* her continued work would eventually be rewarded with back pay and that the grant would be renewed. AOB 9-10; RB 6-7; APP 3. These assurances created an objectively reasonable expectation of employment, i.e., payment for services rendered, at least until she was notified that her employment was terminated. *Id.* Petitioner was first asked to leave by Dr. Wolf in September 1979, then by Dean Biles in November 1979. APP 3. Therefore, Petitioner had a property interest in receiving salary for at least that two-year period, and the right to a hearing before deprivation of that benefit.

Right to salary alone can be a protectible property right. In *Ceko v. Martin*, 753 F.Supp. 1418 (N.D.Ill.1990), a 911 police dispatch operator was placed on unpaid leave of absence. The employee sued the police department, asserting he was deprived of his property interest in continued employment. An Illinois statute prevented his *discharge or suspension* without a hearing and except for

cause, but the police department argued the statute did not apply because the operator was neither discharged nor suspended. The District Court rejected this contention, stating:

> "While it is true that Ceko was not removed from employment in the strict sense of the term, he was effectively *deprived of his salary* when he was placed on involuntary leave of absence. Contrary to defendants' position, such a deprivation arouses due process concerns. . . . *The basic characteristic of a property interest is the continued flow of benefits,* which may not be interrupted without an opportunity to be heard. *See Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *D'Acquisto [v. Washington],* 640 F.Supp. 594, at 609. When the Police Department placed Ceko on involuntary leave of absence without pay, he was deprived of his protected property interest." *Id.* at 1422-1423, emphases added.

Like the plaintiff in *Ceko,* Petitioner was not even informed that USC considered her employment terminated until September 1979, at the earliest; hence at the very least she continued to have a protectible property interest in her salary during that more than two-year period following her faculty appointment.

This conclusion is not altered because USC was her employer. Petitioner did not have to be a *public* employee in order to claim a property interest in her salary because an individual may have a constitutionally-protected property interest in *private* employment. In *Greene v. McElroy,* 360 U.S. 474, 492 (1959), the Court reiterated that "the right to hold specific private employment and to

follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

Not only did Petitioner's property right arise from mutual understandings between her and her employer, but USC's faculty handbook also created an objectively reasonable expectation of continued employment. This Court has recognized that a personnel manual's prohibition of discharge other than for rules violations created a property interest in continued employment for county employees. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-539 (1985). A number of federal courts similarly have concluded that language in an employee handbook or manual can be sufficient to confer a legitimate claim of entitlement to employment. *Merritt v. Mackey*, 827 F.2d 1368, 1370-1371 (9th Cir. 1987). *Doe v. Gates*, 981 F.2d 1316, 1320 (D.C.Cir.1993), *cert. den.* ___ U.S. ___, 126 L.Ed.2d 282 (1993); *Cummings v. South Portland Housing Authority*, 985 F.2d 1, 2 (1st Cir. 1993); *Warren v. Crawford*, 927 F.2d 559, 564 n. 10 (11th Cir. 1991); *Chilingirian v. Boris*, 882 F.2d 200, 205 (6th Cir. 1989).

So too in Petitioner's case, the University's faculty handbook conferred on her *the right to receive salary pending notice and hearing*. USC cannot seriously dispute the application of the handbook's provisions to Petitioner, given that USC directed her attention to that handbook in its March 11, 1977 letter notifying Petitioner of her promotion to the faculty position. AOB 5. The handbook, which the Court of Appeal held was part of Petitioner's employment contract, provides that a faculty member who USC wishes to dismiss has a full set of rights including notice and a hearing prior to the proposed dismissal.

APP 2, AOB 7-8. In addition, it specifies that pending the hearing, the faculty member *continues to receive his or her salary*. AOB 8. In spite of these provisions, Petitioner was deprived of her salary and eventually the job itself, without prior notice or prior hearing. It was not *until November 1979* that Dean Biles communicated the official University position that she had not been considered a faculty member *since October 1977*. APP 3.

Depriving Petitioner of pay while allowing her to work, misleading her about her future with USC, and then evicting her from her laboratory space after a decade of service was not the end of the University's abuse. When in July 1980 Petitioner was forced to vacate at once, an associate Dean took away her research notebooks containing notes made throughout her career, as well as other materials important to Petitioner. Despite repeated pleas, her property was never returned to her. Petitioner had seven manuscripts in preparation and was unable to complete them. AOB 11. Plaintiff's property interest in her notebooks and other materials arises under state law, CAL. CIV. CODE § 654, and is also protected by the Due Process Clause.

In summary, Petitioner was entitled to rely on mutual understandings expressed orally after October 1977, and on the language in the faculty handbook she was provided at the time of her promotion in March of that year. For more than two years she was deprived of a salary *and* a hearing prescribed by the University's own procedures to authorize that deprivation. After a decade's dedication to USC's D.O.E.-funded research, she was advised it had all been for naught. And adding to that injury, her personal property was lost or destroyed at the hands of her

superiors. In short, Petitioner was deprived of constitutionally-protected property interests.

B WHETHER PETITIONER'S EMPLOYMENT AND DUTIES WITH THE UNIVERSITY AS A RESEARCH PROFESSOR WERE SO INTERTWINED WITH THE UNITED STATES DEPARTMENT OF ENERGY BECAUSE IT PROVIDED FULL FUNDING FOR HER POSITION, EXERCISED FINANCIAL CONTROL, DELEGATED AUTHORITY TO THE UNIVERSITY, AND SUPERVISED THE RESEARCH PROJECT, THAT THE UNIVERSITY MUST BE DEEMED A GOVERNMENT ACTOR.

Beside the protected property interest requisite to a Fifth Amendment claim, Petitioner's case also satisfies the requirement of governmental action. The United States Department of Energy, a federal governmental entity, acted through and with USC to achieve its governmental objectives regarding radiation- and energy-related research. Having delegated authority over the project to a private university, the D.O.E. caused USC to be a state actor responsible for its improper actions in executing that authority.

This Court has held that state action exists if the government becomes so intertwined with a private enterprise that it is deemed to be a partner or joint participant in the exercise. The theory originated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In this leading decision, the Court held a privately owned restaurant which leased space in a publicly owned parking facility could not refuse to serve plaintiff based on his race. As in

the case at bar, in *Burton* there was no compulsion or encouragement by the governmental parking authority with respect to the restaurant's restrictive practices. By the private actor's location and status as a lessee of the government, and the participation and involvement of the public entity in the discriminatory service that resulted, the State "not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. at 725. Although there was no single factor in *Burton* which indicated the presence of state action, the Court considered determinative the "framework of the peculiar facts or circumstances present," including the mutual benefit gained, in finding sufficient contacts between the private restaurant and the parking authority to take the challenged actions outside the "purely private" for purpose of equal protection analysis. *Id.* at 722-726.

Similarly here, "sifting facts and weighing circumstances," *Burton, supra,* at 722, the nature and extent of the contacts between USC and the D.O.E. foreclosed a finding of no governmental action under the Fifth Amendment. Petitioner's research work was funded by grants awarded to USC primarily by the D.O.E. Her salary was dependent upon the funding provided by these grants. APP 2. In fact she was promoted to the faculty position so that she could be designated as the Principal Investigator of the D.O.E. project for purposes of USC's compliance with D.O.E. reporting information requirements. RB 7. The D.O.E. prescribed significant and voluminous reporting requirements before it would consider a university's request for renewal of the grant,

including reports relating to overview, progress and renewal. AOB 10; RB 7. Moreover, the budget specifically included Petitioner's USC salary, paid from the D.O.E. grant. RB 7.

It cannot be disputed that the government sometimes acts through and with private entities to achieve public objectives. That plainly is what occurred in this case. To be sure, the provision by a privately-owned enterprise of services the state would not necessarily itself extend, despite extensive regulation, without more does "not fall within the ambit of *Burton*." *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982). But the D.O.E.'s direct 100% funding of the projects for which Petitioner was made responsible, in return for the delegation of duties from the government to USC, together with the mutual benefit derived from her research, created a critical difference: the University voluntarily assumed a role that effectively displaced the government in performing and administrating this research project. At a minimum, it is fair to describe D.O.E. as having acted through a private entity – USC – to achieve its own governmental objectives. Much as was true in *Burton*, although D.O.E. did not compel USC to discharge its responsibilities under the grant or demand that USC stop paying Petitioner her salary, such a showing was unnecessary to a determination in this case that the government was so intertwined with the business of the research project that it must be held responsible for the manner in which the University acted. Nor is it necessary that there be official involvement in the private conduct, as is clear from the line of decisions beginning with *Marsh v. Alabama*, 326 U.S. 501 (1946).

State action has been found to exist in comparable cases involving summary suspensions of physician staff privileges by private entities operating government-owned hospitals. In *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988), a hospital authority leased the facility to a private entity for day-to-day operations. The hospital was publicly owned and constructed with public funds, and retained control of and responsibility for the facility. The Fifth Circuit reasoned:

> "The Authority cannot benefit from private management of the hospital and at the same time insulate itself from liability . . . by that manager. The private defendants cannot receive public funds, utilize public facilities, and serve a public purpose, yet insist that their private status forestalls any connection of a violation of the constitutional rights of their medical staff." *Jatoi*, 807 F.2d at 1221-1222. *See also, Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1196-1197 (10th Cir. 1988).

Of course this Court's more recent treatment of *Burton* in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), rejected the argument that a symbiotic relationship existed between a private school and the state merely on the basis that the students' tuition was paid by the state and was regulated by public authorities. Unlike that kind of situation, however, here the University has not contracted to perform a service such as public education that is sometimes performed by the government. D.O.E. commissioned USC to perform specific radiation- and energy-related research, and D.O.E. fully funded that project. USC appointed Petitioner to a faculty position, tied

directly to the D.O.E. grant, to carry it out. RB 6. This is not a case of simple financial dependence; no less than "Siamese Twins," Petitioner's performance of her responsibilities as a research professor was fully and inextricably intertwined with the actions of D.O.E.

When these facts are sifted and the controlling circumstances are weighed, in totality they compel the conclusion that the contracts and entanglements between the University and D.O.E. established governmental action. That premise was contested neither by Respondent or the Court of Appeal, and it is demonstrable in the record. Accordingly, Petitioner was entitled to Fifth Amendment protection.

CONCLUSION

Petitioner devoted more than two years of her life to important government-commissioned research in a faculty position created by her employer to satisfy the federal grant she was hired to administer, with every expectation she would be paid for her services through the D.O.E. grant. After repeated assurances of continued employment and back salary, suddenly it all evaporated. No hearing preceded her retroactive termination. Her professional career at an end, Petitioner's difficulties were compounded by her attorney's negligent failure to prosecute the wrongful termination action he filed in her behalf. The Court of Appeal's failure to find a deprivation of protected property interests leaves her without redress for the University's Fifth Amendment wrong. Petitioner therefore respectfully prays for issuance of a writ of

certiorari to address these important concerns and remedy the infringement on her constitutional rights.

DATED: October 17, 1995

Respectfully submitted,

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEAN KERTESZ, Plaintiff and Appellant, v. ALBERT CARY PLOTKINS, Defendant and Respondent.	B063391 (Super. Ct. No. C625474) (Filed May 4, 1995)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed.

Robert S. Gerstein for Plaintiff and Appellant.

Maher & Renzi and Michael K. Maher for Defendant and Respondent.

Jean Kertesz sued her former employer for wrongful termination. She lost. She then sued her former attorney for legal malpractice in the handling of her wrongful termination suit. She lost again. We affirm the jury's verdict in favor of the attorney.

FACTS

A.

The Underlying Wrongful Termination Action

During the 1960's and 1970's, Kertesz was a student and paid research assistant working on grant-funded projects under the guidance of Dr. Walter Wolf at the University of Southern California's School of Pharmacy. On July 1, 1977, USC hired Kertesz as a non-tenure track "Assistant Research Professor."[1] Thereafter, Kertesz worked exclusively on research funded by grants awarded to USC, primarily from the United States Department of Energy (DOE), at a salary entirely dependent upon the funding provided by these grants. Generally, the grants ran in renewable three-year periods.

From July 1 on, Kertesz spent "a lot" of time on a DOE project due to expire on August 31 (later extended to October 31). Although it was anticipated that the contract would be renewed, USC had to submit a renewal application to DOE (accompanied by a triennial overview report) sufficiently in advance of the expiration of the existing contract to permit DOE to review the documents and act upon them. Part of Kertesz's job was to prepare

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[1] Kertesz's employment contract consisted of four documents: a letter from the Dean of the School of Pharmacy (John Biles) advising her of her appointment to the position of assistant research professor; two memoranda from Dean Biles to USC's vice-president (one a printed form "Recommendation for Promotion," the other endorsing a salary of $20,000 per year); and the 1974-1975 USC Faculty Handbook. That these documents constitute Kertesz's contract is not disputed. As will later appear, however, there is an issue about the use of parol evidence as an aid to their interpretation.

the scientific materials to be included in the renewal documents. She did not do so in a timely fashion and the overview report was not submitted to DOE until September 1978, by which time the contract had lapsed.

Meanwhile, when the existing contract expired in October 1977, there was no money with which to pay Kertesz and USC stopped paying her. Kertesz nevertheless stayed in her lab, "in a state of limbo," doing some sort of research and attempting to revive the canceled DOE contract. During this time, Dr. Wolf tried to help Kertesz by filing for "no-cost extensions" from the DOE, a device intended to keep the contract technically alive on DOE's books until the necessary paperwork could be completed. The contract was never revived.

By 1979, there was a dispute about Kertesz's status with USC. In September, Dr. Wolf sent a memo to Kertesz, advising that in light of her failure to obtain any funding for nearly two years, she was no longer entitled to use, and would have to vacate, her lab space, remove her personal belongings, and turn over all work performed under various government contracts. In October, Kertesz submitted a grievance letter to USC, raising claims about her salary, research support, the duration of her appointment and her lab space assignment. In November, Dean Biles wrote to Kertesz that, since October 31, 1977, she had not been a faculty member and had been allowed to remain on campus only as a "guest of Dr. Wolf's."

Kertesz pursued the grievance procedures outlined in the USC Faculty Handbook, a three-phase process comprised of an administrative proceeding, followed by mediation, followed by an appeal to a faculty panel. In

June 1980, after unsuccessfully completing the first two phases of the grievance process, Kertesz filed an appeal (a request for a hearing). In July, USC sent Kertesz the forms she needed to go forward with that part of the process. Instead of completing the forms, Kertesz hired a lawyer (Marilyn Garber) and sued USC for an injunction to prohibit its interference with her employment. In July 1980, Kertesz's request for a preliminary injunction was denied and she dismissed that lawsuit. In August 1980, Kertesz either vacated or was evicted from her job space at USC.

Meanwhile, Kertesz also filed a claim for back wages with the California Department of Labor, Division of Labor Standards Enforcement. In May 1980, the Department advised Kertesz that it had received a settlement offer from USC ($11,600). Kertesz failed to respond and in June 1980, the Department notified her that it would take no further action on her claim, which it reassigned to her so she could take whatever action she deemed appropriate.

In October 1981, Kertesz retained attorney Albert Cary Plotkins. On October 26, Plotkins filed a lawsuit against USC on Kertesz's behalf, alleging claims of fraud, breach of contract, sexual discrimination, and intentional and negligent infliction of emotional distress – all based upon her allegation that she had been wrongfully terminated.

On October 3, 1985, Kertesz's case against USC was dismissed for failure to prosecute. (Code Civ. Proc.,

§ 583.420, subd. (a).)[2] Kertesz learned of the dismissal in October 1986 (when pursuant to a new lawyer's instructions she examined the court file). Kertesz's motion to vacate the dismissal was denied and that order was affirmed by Division Two of our court in 1988. (*Kertesz v. University of Southern California* (Aug. 4, 1988) B026013 [nonpub. opn.].)

B.

The Legal Malpractice Action

In November 1986, Kertesz filed the present action against Plotkins for legal malpractice, alleging that his negligence had resulted in the dismissal of her case against USC. In 1991, this case was tried to a jury, which rendered special verdicts, as follows:[3]

"The Legal Malpractice Case

"Question No. 1: Was the defendant Plotkins negligent in his representation of plaintiff Kertesz?

"Answer 'yes' or 'no.'

"Answer: Yes

"If you answer Question No. 1 'no.' sign and return this verdict. If you answer Question No. 1, 'yes,' then answer the next question.

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[2] Unless otherwise stated, all section references are to the Code of Civil Procedure.

[3] There were 25 questions on the verdict form, which was modeled on BAJI No. 16.00 and drafted after extensive discussion and editing by and between the trial court and the attorneys representing both parties.

"Question No. 2: Was such negligence a legal cause of damage to the plaintiff Kertesz?

"Answer 'yes' or 'no.'

"Answer: No.

"*If you answer Question No. 2 'no,' sign and return this verdict.* If you answer Question No. 2 'yes,' then answer the next question." [Emphasis added; the underscored words in bold face were inserted by the jury.)

As directed, the jury signed the verdict and returned it to the trial court without answering the remaining 23 questions.[4] In August, the trial court entered judgment for Plotkins, determining that the jury's finding on "legal cause" meant it had determined that Kertesz would not have won her underlying suit against USC. In October, the trial court denied Kertesz's motions for a new trial and judgment notwithstanding the verdict. Costs were awarded to Plotkins, but they were reduced from the $65,287 he requested to $49,817. Kertesz appeals.

DISCUSSION

A.

Kertesz contends the special verdict question about "legal cause" was misinterpreted by the jury. More specifically, she claims the question was intended to ask the jury whether Plotkins's negligence was the legal cause of the *dismissal* of her action against USC (not whether his

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[4] The trial judge (Hon. Ernest Hiroshige) was out on the day the jury returned its verdict and another judge (Hon. Stephen Lachs) took the verdict. Although Judge Lachs commented that he knew nothing about the case, neither party's trial counsel objected or suggested there was any problem with the verdicts as returned.

negligence was a legal cause of damage to her) and that, so understood, there is no substantial evidence to support the jury's verdict. We disagree.

First, we summarily reject Kertesz's complaints about the form of the special verdict questions and the jury's failure to answer the remaining 22 questions. Her lawyer participated in the preparation of the questions and failed to object, either at the time they were submitted or when the jury returned its answers. Having failed to object before the jury was discharged, Kertesz cannot do so now. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456; *Mixon v. Riverview Hospital* (1967) 254 Cal.App.2d 364, 376; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1182; *Fransen v. Washington* (1964) 229 Cal.App.2d 570, 574; *Fernandez v. Consolidated Fisheries, Inc.* (1953) 117 Cal.App.2d 254, 263; *Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 240.) In any event, the jury followed all the instructions on the verdict form.

Second, we turn to the purely legal question, which is the only one before us under these circumstances – whether the trial court properly interpreted the verdict and entered a judgment in conformity therewith. (*Woodcock v. Fontana Scaffolding & Equip. Co., supra,* 69 Cal.2d at pp. 456-457.) We would reverse only if we found the verdict "hopelessly ambiguous." (*Ibid.*)

We find nothing ambiguous about the verdict. Under the heading of *"The Legal Malpractice Case,"* the jury was asked whether Plotkins's negligence was "a legal cause of damage to the plaintiff Kertesz." We fail to see how it

could be plainer – it asks the jury whether Plotkins's negligent representation of Kertesz in her case against USC was a legal cause of damage to Kertesz. It most certainly does not ask whether his negligence was a cause of the dismissal of her case against USC – if it did, it would be redundant, since that was the focus of the first question ("Was . . . Plotkins negligent in his representation of . . . Kertesz?"). By answering the first question affirmatively, the jury told us that Plotkins's failure to diligently prosecute Kertesz's case against USC resulted in the dismissal of that action and constituted negligence. By answering the second question in the negative, the jury did not repeat itself but told us instead that Plotkins's negligence was not "a legal cause" of damage to Kertesz.[5]

B.

Simply put, it is clear that the jury did not believe Kertesz could have won her lawsuit against USC. This conclusion is clearly supported by the record and by

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[5] We reject Kertesz's reliance on *Falls v. Superior Court* (1987) 194 Cal.App.3d 851. *Falls*, as explained by the court in *Contreras v. Goldrich* (1992) 10 Cal.App.4th 1431, does not support the proposition that the type of special verdicts used in this case are suspect. Where, as here, the jury specially finds that the lawyer's "alleged negligence was not a legal cause of [the plaintiff's] injury, nothing remain[s] for the court but to draw the conclusion of law that [the lawyer] is not liable to [the plaintiff]." (*Id.* at p. 1433.) For these reasons, we reject Kertesz's related claim that *Falls* compels the conclusion that the verdicts were "fatally incomplete." The ultimate issue of causation was resolved, and no more was required.

substantial evidence. As far as the record is concerned, the jury was properly instructed (Kertesz does not suggest otherwise) about the "case within a case" requirements of a legal malpractice action, about the specific elements of Kertesz's underlying causes of action, and about the meaning of "causation." And since the jury was instructed that the entire verdict form could be reviewed before any questions were answered but that the questions should be answered in the order posed, it is immaterial that later, more detailed questions addressed such things as contributory fault and other similar points. The later questions would only be relevant if the first two were ambiguous, which they are not. (*Clark v. McClurg* (1932) 215 Cal. 279, 284 [we must assume the jury gives heed to all instructions].)

As far as the evidence is concerned, it supports the verdict. In a legal malpractice case, a finding of negligence cannot support liability unless it is accompanied by a finding of causation. (*Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754-756.) To prove causation, Kertesz had to prove her underlying case was meritorious. (*Walker v. Porter* (1974) 44 Cal.App.3d 174, 177-178.) This she did not do. Substantial evidence supports the jury's implied finding that the reason Kertesz lost her position is because she failed to do what she was supposed to do to ensure renewal of the DOE grant and funding for her job. In short, had she proceeded to trial against USC on her wrongful termination theories and those related

thereto (i.e., all of her claims against USC), she would have lost.[6]

C.

We reject Kertesz's contention that the evidence shows indisputably that her contract had a one-year term and that, whatever the term of her contract, she could not be terminated until every step of the administrative procedures was completed. Contrary to Kertesz's claim, the USC Faculty Handbook does not promise her a one-year term – its only reference to faculty appointments "on an annual basis" deals with full-time, tenure-track faculty members, which she was not. Her contortionist reading of the Handbook – taking the word "faculty" out of one section, "academic personnel" out of another, and so on – is per se unreasonable. Moreover, it is immaterial since

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[6] Even if Kertesz was correctly interpreting Question No. 2 (to mean that Plotkins's negligence was not a legal cause of the dismissal of her case against USC), there would be substantial evidence to support that finding. Viewed according to the usual rules of appellate review (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926), the record supports a conclusion that Plotkins's negligence was not the cause of the dismissal of Kertesz's action against USC – Plotkins testified that he only agreed to assist Kertesz in the preservation of her claims, that he charged her a fee of only $475 to meet with her and prepare the complaint, and that he told her to obtain another lawyer because he did not intend to represent her throughout the course of the litigation. Indeed, Kertesz admitted that she did not have the financial resources at any time during the pendency of the underlying action to pay for the litigation of that case. No matter how you look at it, while Plotkins might have been technically negligent, he was not the cause of Kertesz's alleged injuries.

there is other evidence (in the form of testimony and memoranda) supporting the judgment, and showing she had no fixed term of employment on her non-tenure track. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 [when extrinsic evidence has been properly admitted and there exists a conflict in the evidence, any reasonable construction of the evidence will be upheld].)[7]

D.

We summarily reject Kertesz's claim that her contract was integrated and that it was therefore error to admit parol evidence to explain its terms. As noted at the outset (fn. 1, *ante*), her "contract" arises from a combination of memoranda and a form and the Faculty Handbook. By no stretch of the imagination did these documents constitute an integrated contract within the meaning of the parol evidence rule. Accordingly, extrinsic evidence was properly admitted. (*LaCount v. Hensel Phelps Constr. Co.* (1978)

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[7] Dr. Wolf and Dean Biles both testified that Kertesz's right to be paid by USC was dependent upon the existence of grant funds and that, as a non-tenure track employee, Kertesz was an at-will employee. Other evidence showed the expiration of the grant, Kertesz's failed efforts to obtain its renewal, and the unavailability of other grant funds to pay her salary. Additionally, Kertesz's failure to complain during the two years she was allowed to continue using the lab supports the conclusion that she herself did not view her contract as one for a fixed term. (*Estate of Bristol* (1943) 23 Cal.2d 221, 223 [all conflicts in the evidence are resolved in favor of the judgment].)

79 Cal.App.3d 754, 770; *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 220-221.)

E.

We also summarily reject Kertesz's contention that she could not be terminated until the administrative grievance procedures were completed. All that matters is that she had an opportunity to pursue these procedures and did so until she decided to abandon those that remained and to pursue this lawsuit instead.

F.

We next reject Kertesz's contention that the trial court erroneously precluded her from presenting evidence that Plotkins's negligence included a failure to plead a claim for tortious breach of the covenant of good faith and fair dealing. Aside from the fact that Kertesz did not plead any such thing (her only claim was that Plotkins failed to diligently prosecute her case against USC), a plaintiff may not assert a claim for tortious breach of the covenant of good faith and fair dealing in the employment contract context. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682-700.) This means there could be no negligence in failing to plead such a claim, which means the trial court properly excluded evidence of Plotkins's failure to do so.

G.

Next, we reject Kertesz's contention that the trial court improperly excluded evidence of her emotional

distress and sexual harassment claims on the ground that those causes of action were time barred by the date she retained Plotkins. USC stopped paying Kertesz in October 1977. In October 1979, she was asked to leave and that is when she filed her grievance. Her first lawsuit (for an injunction) was filed in July 1980 and she left the campus in August 1980. Kertesz first consulted Plotkins in October 1981. Since Kertesz's negligent and intentional infliction of emotional distress claims and her sexual harassment claim were all subject to a one year statute of limitations, and since the statute began running, at the latest, on the day she left USC (August 1980), it was too late for Plotkins to raise these claims in October 1981. (§ 340, subd. (3); Gov. Code, § 12960; *Murphy v. Allstate Ins. Co.* (1978) 83 Cal.App.3d 38, 51.)[8]

H.

We summarily reject Kertesz's contention that her sex discrimination claim was a "common law" cause of action, not a statutory one, and that it was therefore governed by the two-year period of limitations. (§ 339, subd. (1).) First, her complaint alleged a statutory cause

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[8] We reject Kertesz's contention that the period of limitations was extended by her pursuit of her administrative remedies. Whatever truth there may be to the general rule that the statute does not run while a plaintiff is pursuing one of several alternative remedies in order to lessen the extent of her injury (*Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, 490), that rule has no application where, as here, a plaintiff abandons the alternative remedy more than a year before she files suit (July 1980). If there was any tolling, it ended in July 1980 and, as noted, Kertesz did not consult Plotkins until October 1981.

of action. Second, we don't understand what she is talking about when she refers to "common law sex discrimination" and the case she cites does not shed any light on this point. *Edwards v. Fresno Community Hosp.* (1974) 38 Cal.App.3d 702, involved an action by a physician against a hospital for the wrongful revocation of hospital privileges without due process. It has nothing to do with this case (because Kertesz did not have, or allege, the deprivation of a "property right" in her position with USC).

I.

Finally, we reject Kertesz's contention that the trial court abused its discretion in refusing to cut Plotkins's cost bill more than it did. Experts' fees were assessed because Kertesz rejected a section 998 offer to settle for $60,000 and then recovered nothing. Clearly, experts were required in this case, and were reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to the preparation of the case. (§ 1033.5, subd. (c)(2).) It is the need for the expert's assistance in *preparation*, not whether the expert is called as a witness, that is determinative (*Brake v. Beech Aircraft Corp.* (1986) 184 Cal.App.3d 930, 940), and the need for such assistance in a legal malpractice action is beyond question.

The trial court cut one expert's fees from $13,860 to $5,000, and another expert's fees from $8,610 to $2,000. There is no way to say it was an abuse of discretion not to cut those fees still more.

DISPOSITION

The judgment is affirmed. Plotkins is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (Miriam A.), J.

We concur:

ORTEGA, Acting P.J.

MASTERSON, J.

APP 16

Second Appellate District,
Division One, No. B063391

S047103

IN THE SUPREME COURT OF CALIFORNIA

(Filed July 10, 1995)

JEAN KERTESZ, Appellant

v.

ALBERT CARY PLOTKINS, Respondent

Appellant's petition for review DENIED.

LUCAS
Chief Justice